83-1167

In The

Supreme Court Of The United States

OCTOBER TERM, 1983

NO.

IN RE: MOUNTAINSIDE BUTTER & EGG COMPANY,

Petitioner

Petition for Writ of Certiorari To the United States Court of Appeals for the Third Circuit

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PRELIMINARY MATTER

Questions Presented

1. Did the Court of Appeals err in holding that the penalty imposed was not violative of the public interest and/or the legislative purpose of the Egg Inspection Act?

2. Did the Court of Appeals err in holding the Fifth Amendment of the United States Constitution had not been violated because its guarantee of equal protection of the laws had been violated?

3. Did the Court of Appeals err by affirming the finding of the Administrative Law Judge that the violations in question were substantial?

4. Did the Court of Appeals err by failing to consider Appellant's excellent record over the past several years, and affirming the penalty imposed in excess of four years ago, which will put Appellant out of business?

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* The parties to the proceeding in the United States Court of Appeals for the Third Circuit were Appellant Mountainside Butter & Egg Company and the United States Department of Agriculture, Appellee.

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IN THE SUPREME COURT OF THE UNITED STATES

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WRIT OF PETITION

OPINION BELOW

There is no written opinion of the United States Court of Appeals for the Third Circuit, though there is a judgment order. (App. A). There is no opinion of the United States Court of Appeals for the Third Circuit with respect to the Appellant's Sur Petition for Rehearing; there is an order. The opinion and order of the United States District Court for the District of New Jersey are unreported. (App. B, and App. C). There is no written opinion of the United States District Court for the District of New Jersey with respect

to the Appellant's Motion for Reconsideration, though there is an order. The decision and order of the judicial officer of the Office of the Secretary of Agriculture are unreported. (App. D). The reissuance of decision and order of the Administrative Law Judge is unreported. (App. E). The preliminary statement of the Administrative Law Judge is unreported. (App. D includes this preliminary statement).

JURISDICTIONAL GROUNDS IN THIS COURT

The order of the United States Court of Appeals for the Third Circuit here sought to be reviewed is dated September 20, 1983 (App. A). That order affirmed without opinion the judgment of the District Court of New Jersey entered June 23, 1982 (App. B). That Judgment granted the Appellee's cross-motion for summary

judgment, thereby dismissing the Appellant's complaint for judicial review of the final agency action of the United States Department of Agriculture, withdrawing egg inspection services from the Appellant's egg processing plant, pursuant to proceedings governed by the Administrative Procedures Act, 5 U.S.C. Section 701, et seq.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the United States Constitution and federal regulations involved are set forth in Appendix H.

STATEMENT OF THE CASE

BACKGROUND

Mountainside Butter & Egg Company (hereinafter "Mountainside") is the oldest

licensed egg breaking plant in the State of New Jersey. (6T1038-6 to 7).[1] An egg processing plant such as Mountainside uses products that are classified as "restricted" eggs, which are eggs that would normally not be sold in the supermarket and are already dirty or cracked. (7T94-5 to 24). Mountainside is a family-owned business which was begun by the father of Leon and Seymour Goldsman several years ago. Leon Goldsman testified that he began work in the egg processing business as a child, working with his father. The business was later expanded to two garages at the location of his home, and the family bought land in Elizabeth, New Jersey, in 1954 and erected the first phase of its buildings. (6T1039-4 to 8).

Both Leon and Seymour are totally involved on a daily basis with the

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[1]References to the transcripts of testimony will be as follows:

operation of the plant. Seymour Goldsman testified that he is present at the plant from 7:30 in the morning until approximately 8 or 9 in the evening (6T979-9 to 6T908-11). As Leon Goldsman testified: "I work very hard. I'm in that room constantly. There isn't one plant where the owner puts in as much time and effort as at Mountainside." (8T284-18 to 20). Betty Goldsman, wife of Leon, also works at the plant (5T899-13 to 16). The

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"1T" refers to the transcript of August 23, 1977.
"2T" refers to the transcript of August 24, 1977.
"3T" refers to the transcript of August 25, 1977.
"4T" refers to the transcript of August 26, 1977.
"5T" refers to the transcript of September 7, 1977.
"6T" refers to the transcript of September 8, 1977.
"7T" refers to the transcript of April 29, 1980.
"8T" refers to the transcript of April 30, 1980.

Goldsmans are entirely supported by this business, with no outside investments or income (8T273-2 to 13).

On January 3, 1977, the United States Department of Agriculture (hereinafter "USDA"), filed an administrative complaint with USDA, alleging that Mountainside had violated various regulations relating to the processing of egg products. This complaint was filed pursuant to the authority of Section 6(b) of the Egg Products Inspection Act (21 U.S.C. §1031, et seq.), (hereinafter the "Act") and the regulations promulgated thereunder (7 CFR Part 59).

The complaint sought to withdraw egg inspection services performed by USDA for Mountainside. Without such inspection services, the business cannot operate. On January 7, 1977, the parties entered into a

stipulation and consent order (App. F), providing, among other things, as follows:

(a) The stipulation did not constitute an admission or denial by Mountainside that it had violated any of the regulations or statutes involved (App. F, p. 32a, par. 3);

(b) Egg products inspection services at Mountainside's processing plant would be continued to be administered in a "fair and reasonable manner consistent with the administration of the egg products inspection service at all other official plants subject to such inspection." (App. F, p. 33a, par. 6); and

(c) Egg inspection services were withdrawn for a period of 12 months, provided that such withdrawal was held in abeyance and did not become effective unless within one year from the effective date of the order Mountainside failed to

comply with any provisions of the order or permitted "substantial violations which would be a basis for withdrawal of egg inspection services as specified in 7 CFR Part 59.160(f)(1)." (App. F, p. 33a, para. 1).

A formal Consent Order was issued on January 10, 1977 by the Administrative Law Judge, to the foregoing effect, incorporating by reference the aforesaid stipulations. (App. G). On April 27, 1977, USDA filed a motion for imposition of sanction and for oral hearing, claiming various violations of the order of January 10, 1977, by Mountainside. Specifically, the motion charged failure to properly segregate shell egg breaking stock (7 CFR Part 59.510), failure to cause liquid egg to be held in the re-examination vat and to properly re-examine such liquid egg before

being further processed (7 CFR Part 59.522), and failure to cause inedible egg products to be properly denatured (dyed) in order to prevent inedible egg products from being blended into edible egg products (7 CFR Part 59.504(c) and Part 59.522). These violations were alleged to have taken place during the period February through May, 1977. A hearing was held on August 23 through August 26, and September 7 through September 8, 1977. Mountainside denied these violations and introduced testimony in opposition to these charges.

On March 17, 1978, the Administrative Law Judge entered a decision and order, invoking the 12 month suspension of egg products inspection service provided for by the terms of the Consent Order entered on January 10, 1977. (App. D includes this decision and order). After further legal

proceedings a remand hearing was held by the Administrative Law Judge who entered an order in effect reissuing without modification (except for an inconsequential finding) his prior order of March 17, 1978. On August 19, 1980, the Judicial Officer entered a decision and order upholding the determination of the Administrative Law Judge. (App. D). The Judicial Officer further issued a stay pending judicial review.

Mountainside filed a complaint in the Federal District Court seeking review of Judge Campbell's decision and order. The USDA subsequently filed a motion for summary judgment which was granted. Appellant appealed to the United States Court of Appeals for the Third Circuit which entered a Judgment Order affirming the decision of the District Court. (App.

A). No oral argument was entertained by the Court. Mountainside's sur petition for rehearing was also denied.

THE TESTIMONY

During the course of the proceedings below, various inspectors for USDA[2] testified regarding daily reports prepared by them during the course of their inspections at the Mountainside plant. These reports were entitled "Daily Report of Plant Operation" (PY Form 203), commonly called "203's". These 203's were cited by the Administrative Law Judge and the Judicial Officer as a basis for triggering the provision of the Consent Order requiring withdrawal of egg inspection services for one year. Specifically, Line 37 of these reports reflected the alleged violations.

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[2]These people were actually employed by the State of New Jersey but conducted inspections and prepared inspection reports for USDA.

The inspectors testified concerning their finding of certain ineligible[3] eggs in the breaking room during the egg-breaking process. Once detected, the ineligible eggs are removed from the process and placed in a denaturant (dye) to distinquish the ineligibles from the eligibles.

Inspector Robert Poggio acknowledged that approximately 300,000 eggs are processed per day at the Mountainside plant (2T301-7 to 17). Mr. Poggio testified that since Mountainside was subject to constant inspection, the percentages reflected on a 203 report indicated the actual number of eggs found to be defective on a particular day. Mr. Poggio testified that he would look at 100 eggs and would

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[3]These eggs are referred to in the reports as "leakers", "moldies" and "dirties".

find two or three ineligibles. (2T301-18 to 24). Therefore, the indication that there was 2%, 3% or 5% of eggs defective on a given sample, normally meant that those were the number of eggs found to be defective on that date (2T301-25 to 2T302-6). It can hardly be said that 5, 10 or even 20 eggs out of 300,000 being processed in a particular day is substantial.

Ed Hoerning, Supervisory Egg Products Inspector for USDA, acknowledged that normally there were flexibilities built into the inspection system. (4T653-15 to 4T655-12). In other words, there were certain reasonable tolerances allowed. When pressed as to whether a one or two percent ineligibles would be allowed, his answer was "It might be. It might not be. I don't know how to answer that." (4T657-3 to

8). In any event, given the 280,000 eggs processed per day, the actual number of ineligibles was considerably lower than one percent.

Since Mountainside processed almost 300,000 eggs per day, the number of alleged violations during the time period in question must be viewed in the context of the millions of eggs processed from February through May, 1977. The number of alleged violations must also be viewed in the context that Mountainside was subjected to the unique method of double inspection and constant oversight of the egg-breaking process which did not exist at other plants.

The USDA complaint also claimed violations relating to the denaturing of inedible eggs. Denaturing was generally accomplished by placing ineligible eggs in

a bucket of dye, coloring them blue or green to distinguish them from the edible egg products, so that the inedible eggs would not be blended with the edibles. The testimony indicated that Mountainside took substantial steps to assure the proper denaturing of the eggs. (5T901-3-21, 5T906-5T910, and 6T1053-3 to 4). Also, it should be noted that there was never any indication, nor did Judge Palmer find, that any of the eggs which were placed in buckets for denaturing were ever used or blended with the edible products.

The de minimus aspect of the alleged violations is compounded by the fact that Mountainside was subject to the unique method of double inspection, not applied in other plants. It was acknowledged by the USDA and the inspectors that one inspector per plant was normal procedure (1T115-1 to

6; 4T730-16 to 20), and that it was abnormal for two inspectors to be working full-time at inspection stations (1T24-6 to 15; 7T54-2 to 17; 4T730-16 to 20; 5T845-9 to 10). Howard Maguire, a USDA official, acknowledged on cross-examination that there is a distinction when two inspectors are working, as opposed to one -- where there are two inspectors, one is normally in the breaking room actually watching the egg process, while the other inspector can carry out other work duties. This doesn't exist in other plants where one inspector must do all of the chores and therefore is not constantly inspecting. (5T847-13 to 5T848-3). The witness acknowledged that this differentiated Mountainside from other plants (5T848-18 to 22). Mr. Hoerning testified as follows:

> Q. All right. So to the extent that this plant had two inspectors and had continuous

observation of breaking-room procedures, and whatever other procedures were being watched, it was being treated differently than other plants?

"A. Yes.

"Q. As a matter of fact, certainly, if they had two inspectors watching most of the time, that would be different than at other plants, wouldn't it?

"A. Yes, where there is only one inspector assigned to a plant.

"Q. If you take a plant the size of Mountainside and you have two inspectors constantly watching all operations, wouldn't you expect to see more adverse information on the 203 reports?

"A. Yes, you would certainly --if those noncompliances were occurring -- observe more of them.

"Q. Every plant, I think we agreed, in some ways at different times have noncompliances?

"A. The potential is there." (5T848-13 to 5T849-6).

The testimony and 203 reports indicated that where ineligibles were noted

by the inspectors, they were corrected, and there was never any instance during the entire period of time alleged in the complaint that a single instance of salmonella bacteria had been reported back from the laboratory testing Mountainside's end product (3T431-8 to 13; 4T699-1 to 4). The central purpose of the Egg Products Inspection Act is to prevent the carrying of salmonella and other bacteria into commerce, which has been accomplished by Mountainside.

Testimony adduced at the hearings below indicated that the number of incidents of imperfect eggs at Mountainside was not inconsistent with what occurred at other plants. A daily Inspector, William Botelho, testified as to his observations at the Mountainside plant:

> "Q. Now, you've been to Mountainside. As far as you're concerned, is it in any way different from any other plant?

"A. No sir.

"Q. Does it ever have any violations?

"A. Yes, sir.

"Q. Do other plants have any violations?

"A. Yes, sir.

"Q. Is there any difference, as far as you're concerned, in the degree of violations?

"A. No, sir.

"Q. Is there any difference in the degree of sanitariness of the operations?

"A. No sir." (7T148-17 to 7T149-4).

Irene Salt, another inspector, testified that in comparison to another local plant, Papetti's in Elizabeth, New Jersey, the situation at Mountainside was no different. She testified that the total number of non-complying eggs, or percentage of non-complying eggs, is about the same at

Papetti's as it was at Mountainside (8T265-15 to 17). Other testimony of inspectors, as well as an expert presented by Mountainside, was adduced to the same effect.

Mountainside's expert witness Ward Oden testified that he is familiar with many egg processing plants across the country which are similar to Mountainside. He stated that at no other plant had he observed the type of double inspections which occurred at Mountainside. Furthermore, Mr. Oden testified that when compared to other plants, the equipment and operation of the Mountainside plant was substantially the same or better. (3T49-3T51).

It was conceded by Irene Salt that the main difference between Mountainside and other plants, and the basis for the

allegations leading to withdrawal of egg inspection services, was that the principals of Mountainside often disputed the characterization of eggs by inspectors as ineligible, leading to hostility between the inspectors and Mountainside. After conceding that the total number of non-complying eggs or percentage of non-complying eggs is the same at another New Jersey plant, Papetti's (still enjoying inspection services), Ms. Salt acknowledged that the only real difference between the plants was that at Mountainside there were arguments regarding the question as to whether the eggs were eligible or ineligible (7T264-12 to 7T265-24).

THE STIPULATION AND CONSENT ORDER

The Stipulation and Consent Order of January 7, 1977, which was based on prior allegations, similar to the ones made in the instant matter, specifically provided:

> This Stipulation and Consent Order and Motion is for settlement purposes in these proceedings only and does not constitute an admission or denial by respondent that it has violated any of the regulations or statutes involved. (App. F, p. 32a, par. 3). (Emphasis supplied).

This Stipulation was incorporated into the Consent Order of January 10, 1977 (App. G). This Consent Order provided that withdrawal of egg inspection services would not become effective unless within one year from the date of the Order the respondent "committed substantial violations which would be a basis for withdrawal of inspection services as currently specified in 7 CFR 59.160(f)(1)." (Emphasis added).

Given the fact that the prior allegations preceding the Consent Order had not been admitted by Mountainside (nor proved), the Administrative Law Judge noted

that he would not consider any such alleged prior violations as grounds for his decision (2T195-17 to 24; 2T198-1 to 4). Nevertheless, faced with a record that did not support the allegation that violations from February through May, 1977 were "substantial", the Administrative Law Judge improperly, and contrary to his prior statements, based his decision to approve withdrawal of inspection services on these prior violations:

> "Inasmuch as the violations which occurred during February through May, 1977 were identical in kind to those underlying the Consent Order, they necessarily are 'substantial violations' of the regulations calling for a twelve-month withdrawal of inspection services under its terms...." (See App. D, p. 22a). (Emphasis added).

The Judicial Officer adopted the decision of the Administrative Law Judge, incorporating it in his Order. (See App.

D). It is submitted that this reasoning was improper and not in accordance with the Stipulation of the parties. In addition, such reasoning was a clear error in judgment, was not supported by the evidence, and constituted an arbitrary, capricious and unreasonable determination.

The withdrawal of inspection services from Mountainside will result in Mountainside going out of business. Leon Goldsman testified that the suspension of egg inspection services to Mountainside will cause loss of suppliers and customers and the closing down of the plant. As acknowledged by USDA in its brief in the Federal District Court, the imposition of the penalty imposed below will result in Mountainside's inability to market its egg products. The Administrative Law Judge recognized that withdrawal of egg

inspection services would result in a closing down of the Mountainside plant (8T288-6 to 7).

Leon Goldsman indicated that egg processing is a highly competitive business in which suppliers will be compelled to go elsewhere and would be difficult to re-cultivate (8T275-8T276). Seymour Goldsman also testified as to the loss of suppliers and customers should the suspension of 12 months be imposed (6T1040-18 to 6T1041-10). He testified that substantial overhead would still exist despite the fact that employees would be discharged (6T1041-18 to 6T1042-4). This result is inconsistent with the public interest and with the legislative purpose of the Act.

As indicated before, the record indicated no instance of salmonella in the end product produced by Mountainside. No

danger to the public health is at stake in this matter. Moreover, since the time period referred to in the allegations of the Complaint, the 203 reports regarding Mountainside's plant have improved substantially. Throughout the course of these proceedings Mountainside has tried to have each tribunal take note of its excellent record as evidenced by its improved 203 reports. Towards this goal on June 20, 1978 Mountainside filed a motion with the USDA's Judicial Officer for a re-hearing, re-argument and reconsideration, and to reopen the record. Likewise Mountainside filed a Notice of Motion to expand the record so that the Federal District Court would be able to review the 203 reports for the months of May, 1981, and January and February, 1982, and attached those reports as exhibits to an

affidavit submitted in support thereof. (Exhibit 6 which has been marked as part of the record as a proferred proof and 203's attached to Mountainside's motion to the District Court to expand the record, which are part of the record below).

Mountainside contends that the United States Court of Appeals for the Third Circuit did not fully address the issues raised by Mountainside below and that its Order affirming the decision of the District Court Judge, which affirmed the decision of the Administrative Law Judge, was in error. It is respectfully requested that this Court grant the petition for a writ of certiorari so that Mountainside may continue to operate and produce products in accordance with the standards in the industry.

EXISTENCE OF JURISDICTION BELOW

Mountainside brought suit in the District Court on December 1, 1980. The complaint which was filed sought review of the Administrative Law Judge's decision and order. (App. D). This complaint was filed pursuant to 21 U.S.C. §1050, which provides the United States District Court with jurisdiction to enforce compliance and to restrain violations of the Egg Products Inspection Act.

REASONS FOR GRANTING THE WRIT

The imposition of a 12-month suspension of egg products inspection service will destroy Mountainside's business and force it to close. This result should not be permitted in light of the faulty reasoning employed by the Administrative Law Judge and the fact that his findings were arbitrary, capricious and unreasonable.

In addition, Mountainside's record over the past several years since the alleged violations occurring between February and May, 1977 has been excellent, and the destruction of its business is inconsistent not only with applicable principles of law, but with sound economic policy. The record below constitutes an insufficient basis upon which to destroy a business. In today's economy, when most governmental efforts are directed to supporting and maintaining small businesses, the imposition of the penalty imposed on Mountainside is unnecessarily harsh. This is especially so in light of the improving conditions reflected by more recent 203's previously cited. It is respectfully requested that this Court intervene to prevent Mountainside's demise.

I. The legislative purpose of the Egg Products Inspection Act and the public interest are inconsistent with the twelve-month suspension of egg inspection services.

The imposition of the penalty in question will put Mountainside Butter & Egg out of business. This is not in the interest of the public or in furtherance of the legislative purpose of the Egg Products Inspection Act. As indicated in the legislative history to the Act, the statute was designed to both strengthen the ability of Federal and State governments to protect consumers and to provide an environment where the egg products and shell egg industries may continue to flourish. See House Report No. 91-1670, P.L. 91-597.

The punishment of a one year suspension of egg inspection services, which would result in putting Mountainside out of business, is inconsistent with the

public interest and with the very purpose of the Egg Products Inspection Act to permit the egg products industry "to flourish". One might conclude differently if the facts demonstrated that there was a real danger to the public health by the continued operation of the plant. However, the record does not support this contention. The ultimate objective of the Act is to prevent salmonella bacteria from entering the consumer market. House Report No. 91-1670, p. 2. The record indicates that no incident of salmonella was ever reported on Mountainside's products, demonstrating that Mountainside is processing pure and wholesome products for the public. In addition, since the entry of the decision in this matter, the 203 reports of USDA have improved considerably. See Exhibit 6, which has been marked as

part of the record as a proferred proof and which, it is submitted, should have been considered by the Administrative Law Judge in his determination of the punishment. See also exhibits attached to Mountainside's motion to the District Court to expand the record, i.e., more recent 203's, which demonstrate this improvement.

It should be noted that there was testimony that the systems and procedures utilized in the Mountainside plant met the necessary standards and that Mountainside operated on an approved system (3T303-15 to 21). Mr. Hoerning acknowledged in his testimony that the installation of new machines which had been installed at the Mountainside plant would help solve some of the problems encountered during February through May, 1977, especially those relating to the hand-breaking procedures

(4T729-4 to 13). Mr. Maguire acknowledged that the plant facilities and procedures at Mountainside met existing standards, and that there were sufficient employees to meet the work load (5T781-2 to 19; 5T810-21 to 5T811-4). He also indicated that when non-compliances were brought to the attention of management, they were corrected.

The public interest will not be served by putting this family-owned business out of operation. In the General Statement to House Report No. 91-1670 on the Egg Products Inspection Act, the purpose of the Act is set forth as follows:

> This proposal is designed to strengthen the ability of Federal and State government to protect the Nation's consumers and to provide an environment where the egg products and shell egg industries will continue to flourish. Thus, a concerted effort will be made to assure that eggs and egg products...are safe and wholesome for consumers.

As the record indicated, there was never any report of salmonella or any other contaminant in any of the Mountainside products. In addition, increased freezing and pasteurization facilities have been undertaken at the expense of $35,000.00, which was taken out as a loan by Mountainside (6T1056-15 to 18). The total cost of new machinery since the end of 1976 was approximately $150,000.00. Seymour Goldsman testified to improvements made to the plant since January, 1977. A new automatic feeder and an overhaul of prior machines provided Mountainside with two complete automatic feed machines, thus keeping "leakers" to a minimum (6T1055-2 to 11). These improvements in addition to the new Henningson machine and the Seymour washer provided Mountainside with equipment that was superior to those of most other

plants (6T1055-12 to 20). There is no basis upon which this operation should not be allowed to "flourish" in accordance with the legislative purpose set forth in the General Statements quoted above.

During the course of the proceedings, Mountainside offered in evidence 203 reports for the month of April, 1980, in order to demonstrate improvements made on these reports. (See Ex. 6). Line 37 of those reports demonstrates a substantial improvement on the 203's from February through May, 1977. (It is submitted that Judge Palmer should have considered these 203's in mitigation of the penalty imposed. He declined to do so. These 203's were made part of the record as a proffer of proof). Further sample months, May, 1981, and January and February, 1982, were submitted to the District Court on

Plaintiff's motion to expand the record as further examples of improved conditions. Many days on these samples indicate no ineligibles whatsoever.

21 U.S.C. §1047 and the administrative regulations under which the penalties were imposed in the instant matter, are remedial, not punitive. It is submitted that the public interest will not be served by destroying the business of Mountainside Butter & Egg and lessening the competition in the egg processing business in this area. Subsequent steps taken by Mountainside, including the purchasing of new equipment, have substantially improved matters at the Mountainside plant. Since the legislation is remedial and not punitive, such subsequent improvements should be considered. See, to the foregoing effect, Beck v. SEC, 430 F.2d. 673, 675 (6

Cir. 1970). Surely there are other remedies under the Act which could be invoked if and when necessary.[4]

Based on all of the above, it is submitted that it is in the interest of the public and in accordance with the legislative purpose of the Egg Products Inspection Act to allow Mountainside to continue in business rather than put into effect the devastating order withdrawing inspection services for one year, which will effectively put Mountainside out of business. Counsel acknowledges that normally reviewing courts will pay deference to remedies fashioned by administrative agencies. However, where such remedies impair statutory objectives, a court should diligently inquire into the

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[4] §1042-Violations are reported to any U.S. Attorney for the institution of criminal proceedings or to issue a notice of warning to the alleged violator; §1047 - Inspection

justification for such remedies. Papercraft Corporation v. F.T.C., 472 F.2d. 927, 933 (7 Cir. 1973). As indicated above, the statutory objectives and the remedial nature of the legislation are not served by the one year withdrawal of inspection services imposed by the agency below. There is no special need for this exceptional remedy under the facts and

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services may not be provided or withdrawn if the applicant or recipient is found to be unfit; §1048 - Violative products may be administratively detained; §1049 -Violative articles may be proceeded against, in rem, and seized and condemned; §1050 - The U.S. District Court is given jurisdiction to enforce compliance and restrain violations. (On April 19, 1976, the complainant brought such an action seeking a mandatory injunction directing the respondent to comply with the Act. On April 20, 1976, Mountainside consented to the issuance of the injunction and it still remains outstanding to date. Complainant has not sought to enforce the injunction, however, but has instead instituted the present proceeding.) §1051 - Other federal laws may be used to aid in enforcement as well as giving the Secretary the authority to prosecute inquiries necessary to his duties.

circumstances in the instant case. To that extent, the imposition of this penalty constitutes an abuse of discretion and is certainly inconsistent with the public interest and the legislative purpose of the Egg Products Inspection Act.

II. The Fifth Amendment of the United States Constitution guarantee of equal protection of the laws has been violated by the uneven application to Mountainside of the Egg Products Inspection Act.

In this case, Mountainside has been fighting since April, 1977 to prevent the withdrawal of egg product inspection services for a period of one year. This fight started when the USDA filed a motion for imposition of sanction and for oral hearing by claiming that the Consent Order of January 10, 1977 had been violated by Mountainside.

The Consent Order of January 7, 1977 provides in paragraph 6 of the Stipulation

that the egg products inspection service at Mountainside will be administered in a "fair and reasonable manner consistent with the administration of the egg products inspection service at all other official plants subject to such inspection." It is submitted that this provision of the Consent Order has been violated and that egg inspection service has not been administered in a fair and reasonable manner consistent with the administration of such inspection services at other official plants. Indeed, Mountainside has been targeted for unique, selective inspection, which has resulted in its present difficulties.

Mr. Hoerning testified that since Mountainside has two inspectors at its plant, it was being treated differently from other plants. (5T848-13 to 5T849-6).

It is common sense that two inspectors constantly viewing the egg process will discover more alleged violations than one inspector who must divide his time between actual inspection and administrative work. The scrutiny under which Mountainside was placed by the inspectors was admittedly different substantially from the inspections under which other plants were supervised. Under the terms of the Consent Order, they were to be treated like any other plant.

William Botelho, a daily inspector, testified that Mountainside was no different from other egg processing plants, especially with respect to its degree of violations of the operations. (7T148-17 to 7T149-4). Irene Salt, another daily inspector, acknowledged that the violations at Mountainside were no different than that

of another major New Jersey plant, Pappetti's, which still enjoys inspection services of the Department of Agriculture. Her testimony indicated that the actions taken against Mountainside were due in part to hostility between U.S.D.A. officials and the principals of Mountainside. (8T264-12 to 8T265-24). Ward Oden, Mountainside's expert, likewise confirmed that Mountainside is substantially similar to other plants he is familiar with throughout the United States (3T49-3T51).

The atmosphere of bad feelings between authorities at U.S.D.A. and the principals of Mountainside is made clear in the testimony of Mr. Hoerning at 3T91, where he indicates that the disagreements would become arguments and shouting matches, leading to a deterioration in rapport. This is not pointed out simply to take up

sides as to who was right or who was wrong, but merely to indicate the attitudes which prevailed in early 1977, during the unusually concentrated inspections and alleged violations which occurred at Mountainside. This is especially important in light of the testimony and evidence that Mountainside was really no different, if not better, in terms of compliance, than other plants.

Withdrawal of inspection services is a rarely invoked remedy. It would appear that the law is not being applied evenly to parties in similar situations. In essence, Mountainside has been denied the equal protection of the laws guaranteed under the Fifth Amendment of the United States. While the Fifth Amendment does not contain an equal protection clause per se, it does forbid discrimination that is "so

unjustifiable as to be violative of due process." Schneider v. Rusk, 377 U.S. 163, 168, 84 S.Ct. 1187, 1190 (1964). The Supreme Court has approached the Fifth Amendment equal protection claims in the same way as equal protection claims have been approached under the Fourteenth Amendment. Weinberger v. Wiesenfeld, 430 U.S. 636, 95 S.Ct. 1225, 1228, n. 2 (1975); Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 670 (1976). The concept of equal protection has been traditionally viewed as requiring a uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362 (1964). Clearly, Mountainside is not receiving uniform treatment that has been provided to other plants standing in the same relation to the

Department of Agriculture. The Due Process and equal protection rights of Mountainside have been violated and, at the minimum, fundamental fairness has been denied to Mountainside by virtue of the uneven application of the Department's standards and penalties.

III. The decision of the Administrative Law Judge which found that Mountainside had committed "substantial violations" (in violation of its Consent Order) was based on erroneous reasoning, was arbitrary, capricious and unreasonable and should not have been affirmed by the lower tribunals.

In this case the opinion of the USDA's judicial officer was incorporated in the final determination of the Administrative Law Judge. The judicial officer's decision, however, is based on a faulty premise. He found that the violations alleged in the complaint were substantial

"inasmuch as the violations which occurred during February through May, 1977, were identical in kind to those underlying the Consent Order...":

> Inasmuch as the violations which occurred during February through May, 1977 were identical in kind to those underlying the consent order, they necessarily are 'substantial violations' of the regulations calling for a twelve month withdrawal of inspection services under its terms... (App. D, p. 22a). (Emphasis added).

The Administrative Law Judge adopted this reasoning when he noted that:

> ...the withdrawal of inspection services for 12 months is not a sanction imposed because of the violations proven in this case, but because of the violations which form the basis for the consent order... (App. D, p. 12a).

The Consent Order specifically stated that the stipulations did not constitute an admission by Mountainside that it had

violated any of the regulations or statutes involved (App. F, p. 32a). Ironically, the Administrative Law Judge had previously indicated during the course of the proceedings that he would not consider any prior alleged violations pre-dating the consent order (2T195-17 to 24; 2T198-1 to 4). The Judge's reliance on the underlying allegations which precipitated the Consent Order as a basis for finding that the alleged violations in February through May, 1977, not covered by the Consent Order, were "substantial", constituted prejudicial error.

The alleged violations should be judged on their own merits, and not on the basis of prior alleged violations. There were no proofs whatsoever as to these prior allegations. Certainly, it is understandable that Mountainside may have

preferred to enter into the Consent Order as a practical matter in order to continue its business and avoid protracted and costly litigation. It was certainly inappropriate and unfair for the judge to base his finding of "substantial violations" on the basis of prior allegations neither admitted nor proved.

This argument was made before the lower court at the hearing on the motion, but the Court never responded to this argument in its opinion (App. B). This issue was again raised by Mountainside in its motion for reconsideration (see par. 5 of John Brogan's affidavit dated July 23, 1982), which was denied. The determinations below, affirmed by the District Court and the Third Circuit Court of Appeals, were clearly faulty. The circular reasoning employed to support these determinations should be rejected by this Court.

The District Court stated in its opinion:

> ...The ALJ [Administrative Law Judge] heard the testimony of four different inspectors, assessed their credibility and ultimately determined that in fact Mountainside had committed substantial violations of the regulations and had violated the consent degree. Accordingly, he withdrew inspection services for twelve months. (App. B, p. 4a).

The District Court did not analyze the rationale of the Administrative Law Judge leading to the conclusion that there were "substantial violations". The Administrative Law Judge, the District Court and the Third Circuit Court of Appeals each failed to address the faulty rationale of the judicial officer who found "substantial violations" on the basis of prior allegations, neither admitted nor proved.

The validity of an agency's determination must be judged on the basis

of the agency's stated reasons for making that determination. Industrial Union Department v. American Petroleum, 448 U.S. 607, 100 S.Ct. 2844, 2858, n. 31 (1980). An administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its actions can be sustained. Id., and cases cited therein. Clearly, the basis for upholding the decision that the violations in question were "substantial", because they were of the same type underlying the previous complaint preceding the consent order, which were neither admitted nor proved, was based on a reasoning process which begged the question. The Consent Order specifically stated that egg inspection services would not be withdrawn unless within one year from the date of the Order Mountainside

committed substantial violations which would be a basis for withdrawal under the regulations. Violations are not "substantial" simply because they are of the same nature as those alleged (not admitted or proven) in a prior complaint. As indicated above, the determination below was based on consideration of irrelevant factors resulting in a clear error of judgment. Thus, the determination was in fact arbitrary, capricious and unreasonable. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S.Ct. 814, 823-824 (1971).

The judicial officer and the administrative law judge apparently did not find that the violations in and of themselves were "substantial", but relied on the fact that they were the same type of alleged violations which preceded the

Consent Order. These prior alleged violations were neither admitted by Mountainside, nor proved by the USDA, nor were they a proper consideration in determining whether egg inspection services should be withdrawn in the instant matter.

IV. If the penalty which was imposed over four years ago is permitted to stand, Mountainside's excellent record over the past several years will have been ignored and Mountainside will be forced to cease operating.

On March 17, 1978 the Administrative Law Judge entered a decision and order which invoked the 12-month suspension of egg products inspection service provided for by the terms of the Consent Order entered on January 10, 1977 (App. D includes this decision). Since the imposition of this penalty Mountainside has purchased new equipment and a more conducive attitude to suggested violations

has substantially improved the Mountainside plant. This is reflected in the 203's which Mountainside has attempted to bring to the attention of the the USDA's Judicial Officer (a motion for re-hearing, re-argument and reconsideration, and to reopen the record) and the District Court Judge (a motion to expand the record). Mountainside's excellent record over the past several years militates against the imposition of this one year penalty which will cause the oldest licensed egg breaking plant in New Jersey to cease operating. This unfair result should not be permitted to occur.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the petition for writ of certiorari should be granted.

Respectfully submitted,

JUSTIN P. WALDER
for Petitioner Mountainside
Butter and Egg Company